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No. 18

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

U.S.A.C. TRANSPORT, INC.,
COMMON CARRIER CONFERENCE—IRREGULAR ROUTE,
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
And
REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants

v.

J. T TRANSPORT COMPANY, INC., ET AL.,
Appellees

On Appeal From The United States District Court For The Western District of Missouri—Western Division

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BRIEF

ROLAND RICE
JOHN C. BRADLEY
618 Perpetual Building
1111 E Street, N. W.
Washington 4, D. C.

PAUL F. SULLIVAN
1821 Jefferson Place, N. W.
Washington 6, D. C.

JAMES E. WILSON
716 Perpetual Building
1111 E Street, N. W.
Washington 4, D. C.

Attorneys for Appellants

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INDEX

		PAGE
I	OPINIONS BELOW	1
II	JURISDICTION	2
III	STATUTES INVOLVED	2
IV	QUESTIONS PRESENTED	2
V	STATEMENT	3
VI	SUMMARY OF ARGUMENT	8
VII	ARGUMENT	11
	A. Consideration of Adequacy of Existing Service Not Only Permissible, But Required	11
	B. Amendment to Section 209(b) Did Not Exclude Adequacy of Existing Service	19
	C. Legislative History Demonstrates That No Change In Statutory Standard Was Intended or Accomplished	27
	D. The District Court Substituted Its Judgment For That Of The Commission	34
VIII	CONCLUSION	40
	APPENDIX	41

CITATIONS

CASES:

Alexandria, Barcroft & Washington Transit Company and Washington, Virginia and Maryland Coach Company et al. v. *United States of America and Interstate Commerce Commission*, July 10, 1961 (E.D., Va.) 18

American Red Ball Transit Co. Inc. v. *McLean Trucking*, 67 M.C.C. 305 (1956) 37

PAGE

American Trucking Asso. v. *United States*, 326 U.S. 77 (1945) 15
American Trucking Asso. v. *United States*, 355 U.S. 141 (1957) 14, 16
American Trucking Asso. v. *United States*, 364 U.S. 1 (1960) 14, 16, 17, 21
Avent v. *United States*, 266 U.S. 127 (1924) 11
Bass v. *United States*, 163 F. Supp. 1 (1958) 17
Case v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939) 20
C. & D. Oil Co. Contract Carrier Application, 1 M.C.C. 329 (1936) 6
Classification of Motor Carriers of Property, 2 M.C.C. 703 (1937) 37
Continental Tennessee Lines, Inc. v. *Ligon*, 78 M.C.C. 319 (1958) 38
Dealers Transit, Inc., Interpretation of Certificate, 76 M.C.C. 12 (1958) 38
Descriptions in Motor Carrier Certificates, 61 M.C.C. 209 (1952) 37
W. J. Dillner Transport Co.—Investigation of Operations, 79 M.C.C. 335 (1959) 37
Eastern-Central M. C. Assoc. v. *United States*, 321 U.S. 194 (1944) 16
Federal Communications Commission v. *RCA Communication, Inc.*, 346 U.S. 86 (1953) 13, 14
Federal Power Comm. v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944) 12, 13
Gemsco v. *Walling*, 324 U.S. 244 (1945) 20
Interstate Commerce Commission v. *Parker*, 326 U.S. 60 (1945) 14, 15
Keystone Transp. Co. Contract Carrier Application, 19 M.C.C. 475 (1939) 25
Koppers Conn. C. Co. v. *Jas. W. B. Line*, 89 F. 2d 865 (1937) 25

PAGE

Mercer Extension — Oilfield Commodities, 74 M.C.C. 459 (1946) 38
Morissette v. *United States*, 342 U.S. 246 (1952) 20
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 13
New York Central S. Corp. v. *United States*, 287 U.S. 12 (1932) 11, 12
Packard Motor Co. v. *National Labor Relations Board*, 339 U.S. 485 (1947) 20
Pennington v. *Coxe*, 6 U.S. 33, 2 Cranch 33 (1804) 20
Podolsky Contract Carrier Application, 2 M.C.C. 653 (1937) 27
Schaffer Transportation Co. v. *United States*, 355 U.S. 83 (1957) 9, 15, 16, 21
Smith & Solomon Trucking Co., Extension—Camden, N.J., 61 M.C.C. 748 (1953) 25
St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling, 53 M.C.C. 277 (1951) 37
Texas & P.R. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 25
Unexcelled Chemical Corp. v. *United States*, 345 U.S. 59 (1953) 20
United States v. *Chemical Foundation*, 272 U.S. 1 (1926) 11
United States v. *Contract Steel Carriers*, 350 U.S. 409 (1956) 28
United States v. *Missouri P. R. Co.*, 278 U.S. 269, (1929) 20
The Western Express Company, Extension—Sealdtanks, —— M.C.C. ——, March 22, 1961 (Docket No. MC-8902, Sub 12) 37

PAGE

STATUTES:

Interstate Commerce Act (49 U.S.C. 1 et seq.):
National Transportation Policy.. 2, 6, 7, 8, 9, 10, 11, 15, 17, 19, 20, 21, 23, 24, 26, 27, 28, 35, App., p. 44
Section 5 ..... 11, 14
Section 202(a) 27
Section 203(a)(15).. 2, 6, 7, 8, 19, 28, 33, App., p. 41
Section 207 14
Section 209(b) ..... 2, 6, 7, 8, 17, 19, 20, 21, 22, 23, 26, 28, 32, 34, 35, 39, App., p. 41
28 U.S.C. 1253 2nd 2101(b) 2
47 U.S.C. 307(b) 13

MISCELLANEOUS:

Hearings Before A Subcommittee Of The Committee On Interstate And Foreign Commerce, U.S. Senate, 85th Cong., 1st Ses., On S. 1384 And Other Bills 29, 30, 31, 32, 33
S. 1384, 85th Cong., 1st Ses. 28
S. Rep. No. 703, 85th Cong., 1st Ses. 34

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BRIEF

I

OPINIONS BELOW

The opinion of the District Court (R. 160) is reported in *J - T. Transport Co.* v. *United States,* 185 F. Supp. 838 (1960). The decision of Division 1 of the Interstate

Commerce Commission and that of the entire Commission appear at 74 M.C.C. 324 (1958) and 79 M.C.C. 695 (1959), respectively (R. 22, 28).

II

JURISDICTION

This is an appeal under 28 U.S.C. §§ 1253 and 2101 (b) from a final judgment of the district court entered August 9, 1960, which set aside an order of the Interstate Commerce Commission (R. 159). Notice of appeal was filed October 7, 1960 (R. 185). Probable jurisdiction was noted February 20, 1961 (R. 186).

III

STATUTES INVOLVED

This appeal involves the construction to be given the August 22, 1957 amendments to §§ 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309(b), 71 Stat. 411, and whether § 209(b) as amended is to be so construed as to exclude therefrom the mandate of the National Transportation Policy, 49 U.S.C. preceding § 1, 54 Stat. 899. These statutory provisions as formerly written and, where applicable, as amended, are set forth in the Appendix attached hereto.

IV

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission is required as a matter of law to disregard the availability of adequate common carrier service in determining whether a grant of a permit to a motor contract carrier would be consistent with the public interest and the National Transportation Policy.

2. Whether the district court erred in finding that adequacy of existing motor carrier service may not be weighed by the Interstate Commerce Commission in considering (a) the effect which granting the permit would have upon the services of protesting carriers, and (b) the effect which denying the permit would have upon the shipper.

3. Whether, the Interstate Commerce Commission having made a factual finding supported by substantial evidence that the service required by the shipper could be provided by a common carrier, the district court committed error by substituting its judgment for the Commission's in making a finding of fact to the contrary.

V

STATEMENT OF THE CASE

A. The Controlling Facts

The Interstate Commerce Commission denied an application which sought a contract carrier permit authorizing the transportation by motor vehicle of airplane parts, uncrated (R. 63), or "assemblies" (R. 64), from Indianapolis, Indiana, to Wichita, Kansas, (R. 59-60). The application was actively opposed by U.S.A.C. Transport, Inc. [hereinafter called USAC] (R. 60), a common carrier (R. 150) by motor vehicle specializing in the transportation of aircraft, aircraft engines, and aircraft parts (R. 148-149, 152-155, 157). Other protestants included the Atchison, Topeka and Santa Fe Railway Company, which handled the traffic in 1956 (R. 138), and Daniel Hamm Drayage Company [hereinafter called Hamm], a motor carrier experienced in hauling aircraft components (R. 133) which, with protestant Belger Cartage Service, Inc., [hereinafter called Belger] offers a through, joint-line service with Hamm's vehicles (R. 127, 132).

Applicant is presently transporting landing gear bulkheads under temporary authority issued to it by the Commission (R. 64-65, 81, 99), and uses a trailer especially modified to accommodate the commodity (R. 68-72, 81, 141-145). Loading and unloading are accomplished by the consignor and the consignee, respectively (R. 74, 81, 93). Lifting equipment is supplied at origin by the consignor (R. 75).

A truckload, consisting of 4 bulkheads, weighs about 5500 pounds and is valued at approximately $97,290. The consignee, Boeing Airplane Company [hereinafter called Boeing], knows in advance when shipments are to move (R. 102), and schedules them to arrive at Wichita for installation in designated aircraft (R. 86). Although Boeing admitted that USAC has equipment which might be used to transport bulkheads (R. 103) and Boeing would be willing to work with a carrier other than appellee to accomplish modification of trailers (R. 103), it will not use a common carrier because it believes that a common carrier cannot lawfully dedicate a trailer to the exclusive use of one shipper (R. 97, 103).[1] Also, USAC has no office at the destination point, Wichita (R. 101). It does have one at the origin point (R. 115).

The Boeing witness expressed discontent with the service of USAC on the ground that a component handled by that carrier in 1953 [4 years before the hearing] became unbolted from its shipping fixture while in transit. The hearing examiner shut off cross-examination by USAC's attorney respecting the incident on the ground that it was remote as to time. Although USAC has not been allowed by Boeing to transport the instant traffic (R. 104-105), the carrier was asked by Boeing to obtain emergency authority to handle Boeing traffic at Seattle,

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[1] A common carrier is not proscribed from using a vehicle to serve just one shipper, so long as it offers such a service to all on equal terms.

Washington (R. 117). The Hamm-Belger joint-line service has not been tried by Boeing (R. 94-95). No damage had been experienced by Boeing on either rail or truck shipments up to the time of the hearing (R. 124).

The equipment of USAC, which carrier has transported similar articles (R. 113), can be modified to handle the instant shipments (R. 112). USAC estimates that modification to specification would take ten days to two weeks (R. 117-118). It maintains a terminal at the origin point, Indianapolis (R. 115). The USAC tariff provides that the determination of equipment to be used will rest exclusively with the carrier (R. 120).

Protestant Hamm participates in the business of hauling aircraft components (R. 133). At the time of hearing it had three airplane trailers idle (R. 132). Hamm interchanges equipment with protestant Belger and each is willing to participate in a joint-line through service to transport the instant traffic (R. 127, 132).

B. The Course of Litigation Below

The report and order recommended by the hearing examiner (R. 15-21) concluded, "* * * that a need has been shown for the proposed operation and that a grant of such authority will not adversely affect present transportation facilities to any material extent." (R. 19-20). Upon the filing of exceptions and replies thereto, Division 1 of the Commission issued a report dated January 31, 1958 (R. 22-27). Therein it was concluded that the supporting shipper had not used the service of existing motor carriers [USAC and Hamm-Belger] shown by the record to exist (R. 26), that the untried services had not been shown to be "inadequate" (R. 26), and that a "service not needed cannot be found to be consistent with the public interest or the National Transportation Policy." (R. 27).

In due course the Commission on reconsideration issued a further and more detailed report dated June 15, 1959 (R. 29-53). That report, upon reviewing the background

to the 1957 amendments (R. 35-41) and measuring the record against the factors added to § 209(b) by those amendments (R. 45-48), concluded that J - T had not satisfied its burden of proof as an applicant (R. 49-50). The Commission also concluded that it had a positive duty to consider any relevant matters embraced by the National Transportation Policy (R. 43), and that, therefore, the specific factors set forth in amended § 209(b) were not all-inclusive and did not preclude consideration of other factors which may in a particular case effect the public interest and the National Transportation Policy (R. 48).

Following the filing of a complaint (R. 1-15) by applicant in the United States District Court for the Western District of Missouri, Western Division, on August 21, 1959, that Court found the Commission's order unlawful and void, remanding the case to the Commission for further proceedings consistent with the Court's decision (R. 179). There are thus raised the questions earlier stated.

C. The Decision of the District Court

In this proceeding the Interstate Commerce Commission, charged by Congress with the responsibility for determining whether the grant of a contract carrier permit will be "consistent with the public interest and the national transportation policy", has taken into consideration the question of whether the services of existing common carriers are adequate. This factor has been determined by the Commission to be appropriate for use in measuring consistency with the public interest almost from the beginning of its regulation of the motor carrier industry.[2]

The 1957 amendments to §§ 203(a)(15) and 209(b) of the Interstate Commerce Act added several specific criteria which the Commission is thereby required to con-

[2] See *C. & D. Oil Co. Contract Carrier Application*, 1 M.C.C. 329 (1936).

sider in applying the basic statutory standard of consistency with the public interest and the National Transportation Policy. We are now confronted by a District Court decision concluding that adequacy of existing carrier services is no longer a valid consideration in measuring a contract carrier permit application against the public interest and the National Transportation Policy, even though at least two of the new specific criteria clearly embrace that factor.

Justification for this position is sought in the legislative history of the 1957 amendments. There it is shown that an additional clause was eliminated from the original proposal. If enacted, this clause would have curtailed the breadth of the Commission's area of discretion by requiring *denial* until and unless a contract carrier applicant had affirmatively proved that existing carriers were "unable and unwilling" to provide adequate service. The fact that the restrictive clause was eliminated from the amendments a originally proposed is now seized upon by appellees as the basis for several unsound propositions. All were adopted by the District Court. These include:

(1) That the statute as it now exists is so ambiguous as to require inquiry into the legislative history of §§ 203(a)(15) and 209(b) in order to permit reasonable interpretation thereof;

(2) That, by withdrawing the proposed requirement which would have limited the Commission to approval of contract carrier permits only where an applicant had shown existing carriers to be "unwilling or unable" to provide the service needed, Congress took from the Commission the power to consider, where appropriate and at the Commission's discretion, adequacy of existing motor carrier service;

(3) That, by eliminating from the amendment as proposed the clause restricting the Commission's area of discretion, Congress sought to and did materially change (so as to lighten) the burden of proof placed

upon a contract carrier applicant by the legislative standard as formerly provided;

(4) That all considerations involving the public interest and the National Transportation Policy, save those specifically set forth in § 209(b), as amended, have now been excluded from determination of contract carrier applications.

VI

SUMMARY OF ARGUMENT

In 1957 certain amendments to the Interstate Commerce Act modified the definition of contract motor carriers in § 203(a)(15), and added to § 209(b) specific elements to be considered by the Commission in determining whether issuance of a permit will be consistent with the public interest and the National Transportation Policy. The elements enumerated for consideration are as follows:

> "• • • the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. • • •"

These appellants urge that the Commission in making its determination whether a permit should issue under the Act as amended is not required to disregard the availability of adequate common carrier service proffered under a certificate issued by it. The language of the amendment specifically requires that the Commission consider the effect which granting the permit would have upon the service of protesting carriers and upon the applicant's shipper. Patently neither of these could reasonably be evaluated if the Commission disregarded the availability of adequate common carrier service. The specific mandate of the statute is binding upon the Commission and any

suggestion that it disregard the available service of a common carrier is plainly in contravention of the law.

But assuming, arguendo, that in directing the Commission to consider the *effect* which granting the permit would have upon the service of protesting carriers the Congress did not direct it to consider the *availability* of adequate common carrier service, the question arises whether the Commission in its discretion may, nevertheless, do so. "Effect" does not exist in a vacuum, and can be considered only in relation to what is available. Further, it is here asserted that under the terms of the National Transportation Policy the Commission is obliged to weigh every element that in its expert judgment has a bearing upon the national transportation system. It can do no less under the Congressional injunction there set forth "* * * to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *". Should there be doubt about such authority it is dispelled by the further policy injunction that "All of the provisions of this [Interstate Commerce] Act shall be administered and enforced with a view to carrying out the above declared policy." As was said in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 88 (1957), "This Court has made it clear that this [national transportation] policy is the yardstick by which the correctness of the Commission's actions will be measured."

Congress has recognized the peculiar competence of the Interstate Commerce Commission by reposing in it the duty of regulating transportation in such manner as to achieve the objectives of the National Transportation Policy. Consequently we assert that the lower court erred when it found that the Commission may not weigh adequacy of existing service in considering the effect which granting a new permit would have upon services of an existing carrier. It is axiomatic that the effect upon a

present service of creating a new service cannot be measured unless the Commission evaluates the adequacy or sufficiency of the present service.

And the court below, we assert, is in an even more untenable position when it says that adequacy of existing service may not be weighed by the Commission in considering the effect which denying the permit would have upon the applicant's shipper. This factor or element is one of those specifically enumerated by Congress in the 1957 amendments to be considered in determining consistency with the public interest and the National Transportation Policy. It is obvious that the effect upon a shipper of grant or denial of additional carrier authority cannot possibly be determined without considering the adequacy of present carrier service available to that shipper. If it is adequate or satisfactory or sufficient, any new competitive service may adversely affect it which cannot be said to be consistent with the public interest. And if it is inadequate or unsatisfactory, or insufficient, it is not inconsistent with the public interest to fill the void by creating a new service. The Commission, as the repository of regulatory authority must be allowed to weigh adequacy of existing service as an essential ingredient of the tests.

The conclusions heretofore advanced may be reached from a reading of the clear terms of the statute and without reliance upon the legislative history of the 1957 amendments. But if resort is had to legislative history the same result is achieved. The pertinent 1957 amendments were added to make clearer the distinctions between common and contract motor carriage. Tests theretofore applied by the Commission in determining the "public interest" aspect of additional contract carrier authority were known to Congress and not rescinded. Failure to make additional proposed changes restrictive in nature in their effect upon contract applicants merely broadens the Commission's discretionary authority or, at the very least, does not restrict it.

Finally, the Commission's factual finding that the service can be provided by a common carrier should be left undisturbed since it is supported by substantial evidence. The record contains evidence, discussed at some length in the report, that the protestant carriers provide service identical with that proposed, and operate equipment designed, or to be modified, to handle the particular types of shipment to be proffered. In the face of this ample evidence, and of the Commission's discussion thereon, it was error for the court to substitute its judgment on the facts.

VII

ARGUMENT

A. Consideration of Adequacy of Existing Service Not Only Permisible, But Required

Public Interest Contemplates Consideration of Adequacy

Essentially, the instant controversy involves a dispute as to whether the Interstate Commerce Commission in denying a request for contract carrier authority has exceeded its discretionary powers as delineated by the legislative standard laid down by Congress for application in such matters. Stated more specifically, may the Commission within that standard (consistency with the public interest and the National Transportation Policy) consider the adequacy of existing motor carrier service. In resolving the issue, it is helpful at the outset to recall the broad range of discretion recognized by this Court to be lodged in administrative agencies.

It is well settled that the term "public interest" standing alone is in itself sufficient as a legislative standard. *Avent* v. *United States,* 266 U.S. 127 (1924); *United States* v. *Chemical Foundation,* 272 U.S. 1 (1926). Although arising under § 5 of the Interstate Commerce Act, the Court's decision in *New York Central S. Corp.*

v. *United States*, 287 U.S. 12 (1932), contains a revealing discussion of the meaning of the term "public interest." There it stated that:

> "• • • The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but *has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities*, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, *the question is not essentially different* from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and *to the issue of certificates of public convenience and necessity.*" [287 U.S. 25] (Emphasis supplied)

It was also recognized that by use of the aforementioned standard:

> "• • • The question whether the acquisition of control in the case of competing carriers will aid in *preventing an injurious waste* and in securing more efficient transportation service *is thus committed to the judgment of the administrative agency upon the facts developed* in the particular case." [287 U.S. 26] (Emphasis supplied)

The term "public interest" not only is irrevocably associated with considerations of adequacy of service, but, as well, the area of permissible inquiry by the administrative agency seeking to measure the "public interest" is recognized as broad.

Broad Interpretation Under Other Statutes

One of the landmark cases in this general field is *Federal Power Comm.* v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944). There Congress had provided that certain natural gas rates regulated by the Federal Power Commission should be "just and reason-

able", but no express formula was provided for reaching the required determination. It was held that the Commission was not bound to any formula or combination of formulae in order to comply with the legislative standard [320 U.S. 602]. It is the result reached, not the method employed which is controlling. This Court there held that, "• • • the product of expert judgment • • • carries a presumption of validity." [320 U.S. 602].

In *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), the legislative standard laid down by Congress to guide the Federal Communications Commission in the exercise of its licensing power was the "public convenience, interest or necessity," certain specific criteria being set forth in § 307(b) of the Communications Act [47 U.S.C. 307(b)]. The standard of "public interest" was found not to be vague [319 U.S. 225-226] and despite the specific criteria wide discretion was recognized to have been placed in the administrative agency through the legislative standard adopted by Congress.

Even in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), wherein a decision of the F.C.C. was overturned, wide latitude was recognized in the hands of the administrative agency when applied within the sphere of its own expertise. There, where the agency sought to license one of two competitors on the ground that it was national policy to encourage competition, the Court in rejecting the agency action nevertheless stated that the result reached would have been valid, "[h]ad the Commission clearly indicated that it relied *on its own evaluation of the needs of the industry* rather than upon what it determined a national policy • • •." [346 U.S. 94] (Emphasis supplied) It was found that competition might be allowed, whenever *the Commission* finds "that tangible benefit to the public would be derived from the authorization" [346 U.S. 89], but "• • • the Commission must at least warrant, as it

were, that competition would serve some beneficial purposes such as maintaining good service and improving it." [346 U.S. 96-97].

Consideration Permissible Under Legislative Standard

It is clear from the foregoing that where broad legislative standards are laid down by Congress to guide an administrative agency in the exercise of its functions, the agency may consider and give weight to factors or elements reasonably embraced within that standard. What is appropriate may well vary from case to case. But so long as the factors or elements considered are consistent with the standard and with the purpose and policy of the act administered, and do not fall into areas outside the expertise of the agency, any material and relevant factor developed of record will not be found to be inappropriate. In short, the range of administrative discretion is broad. That of the Interstate Commerce Commission is no exception.

In *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945), the Commission's action in granting a certificate of "public convenience and necessity"[3] to a rail affiliate was under attack. There the Court said that:

> "* * * The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience

[3] With respect to the scope of administrative discretion, there is no difference in approach based upon whether a standard is laid down in terms of "public convenience and necessity" or "consistency with the public interest." Indeed, in *American Trucking Associations* v. *United States*, 355 U.S. 141, 149-150 (1957) it was expressly recognized that where within the "public interest" under § 5 of the Act a railroad might obtain control of a motor carrier operation only if such operation could be used to benefit in the railroad operation, the policy thereby expressed would generally be applied as well in matters arising under § 207 of the Act where the legislative standard involved "public convenience and necessity." See also *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1, 7 (1960).

and necessity. Cf. Powell v. United States, 300 US 276, 287, 81 L ed 643, 651, 57 S Ct 470. This, of course, gives administrative discretion to the Commission, cf. McLean Trucking Co. v. United States, 321 US 67, 87, 88, 88 L ed 544, 556, 557, 64 S Ct 370, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * *" [326 U.S. 65]

Referring to the National Transportation Policy and the broad generalizations contained therein, the Court said:

"* * * In such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress." [326 U.S. 66]

It was further stated that the Commission:

"* * * is in a position to determine by its administrative discretion whether the projected service may be better rendered by the railroad or existing motor carriers. * * *" [326 U.S. 72-73]

Consideration Required by National Transportation Policy

Moreover, in a concurrent decision, *American Trucking Asso.* v. *United States*, 326 U.S. 77 (1945), the interest of the public was specifically tied to consideration of the effect of the proposal upon other carriers. In finding that, "* * * the Commission should have admitted evidence of the flow of traffic by truck * * *", the Court stated that the problem of whether to grant a certificate to rail subsidiaries could be solved only after receipt of evidence as to the probable effect of the proposal on protesting motor carriers [326 U.S. 85, 86].

It is fair to conclude that while, on the one hand, there rests in the Commission wide latitude in the selection of factors or elements to which it may give weight, its administration of the Act, on the other hand, must always be accomplished with full regard to the National Transportation Policy. In *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), the Court stated that:

> "The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured • • •. [pages 87-88]
>
> • • • •
>
> "• • • since the findings • • • do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said." [page 92]

See also *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1, 11 (1960); *Eastern-Central M. C. Assoc.* v. *United States*, 321 U.S. 194, 206 (1944); *American Trucking Assos.* v. *United States*, 355 U.S. 141, 152 (1957).

The district court's decision is thus framed by this situation: (a) On the one hand, the Commission is accorded great latitude in considering factors which shed light on the public's interest, here exercised by considering the adequacy of service offered by existing carriers; and (b) on the other hand, Congress actually *required* such consideration in view of its mandate that the Commission, "• • • promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers • • •." Such service and such conditions are not promoted or fostered by licensing new carrier operations to perform a service which could be adequately rendered by existing carriers.

Recent Court Decisions

Several Court decisions issued since August 22, 1957, bear upon propriety of the Commission's grant or denial of contract carrier applications. The most illuminating is that of this Court in *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1 (1960). There the Commission's *grant*

of a permit to a rail-controlled motor carrier was successfully attacked. It was found that the Commission's decision had failed to take into consideration general policy firmly intrenched in the law and implemented through a series of Commission decisions into a set of reasonably concrete standards [364 U.S. 7]. This Court once again commanded[4] that the Commission *must* take cognizance of the National Transportation Policy and apply the Act "as a whole." [364 U.S. 11]. The district court in the instant case denied the Commission the power to do just that.

Moreover, in the *American Trucking* case, specific comment was made that the policy of the act does not allow issuance of a permit simply because a shipper wants a contract carrier service [364 U.S. 15]. These appellants submit that the supporting shipper here evidenced nothing stronger than such a desire, as distinguished from an actual need.

It seems clear that the *American Trucking* case negates the theory advanced by appellees and accepted by the district court that the 1957 amendments severed § 209(b) from any connection with criteria, tests or standards developed and applied in precedent cases arising prior thereto. This Court has reaffirmed the command to the Commission that it must take full cognizance of the National Transportation Policy and apply the Act "as a whole"—not confined exclusively to the narrow limits of the criteria added to § 209(b).

Similarly, in *Bass* v. *United States*, 163 F. Supp. 1, 3 (W. D. Va. 1958), aff'd 358 U.S. 333, rehearing denied 359 U.S. 956, a contract carrier applicant had been denied authority to perform a charter service which common carriers of passengers were already authorized to perform. There the court stated that:

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[4] Specific acknowledgment was made of the 1957 amendments, see 364 U.S. 13, footnote 9.

> "• • • However, we do not agree that the National Transportation Policy adopted by Congress legislated, as the plaintiff contends, that, even though a particular type of charter service is made adequately available by common carriers, the Commission must nevertheless authorize duplicate service, whenever the same is tendered, by contract carriers who are not common carriers. In other words, we do not believe that Congress, in laying down its national policy, meant that, notwithstanding the existence of adequate contract charter service by common carriers, the Commission is still compelled to allow duplicate facilities by one who offers contract service exclusively.
>
> "We hold that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interests and the national transportation policy."

It is clear from the above that the court relied on the validity of the adequacy doctrine in upholding the decision of the Commission.

A similar case arose in the United States District Court for the Eastern District of Virginia, Civil Action No. 2023, *Alexandria, Barcroft & Washington Transit Company and Washington, Virginia and Maryland Coach Company, et al.* v. *United States of America and Interstate Commerce Commission,* July 10, 1961. There, plaintiff common carriers contended that the Commission had erred in granting a contract carrier permit to perform charter passenger service because it did so in the mistaken belief that, as a matter of law, plaintiff common carriers could not provide the service required by the customer [The United States Government]. In upholding the plaintiff's view of the case, the District Court[5] by decision dated

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[5] SOBELOFF, Chief Circuit Judge, HAYNESWORTH, Circuit Judge, and BRYAN, District Judge.

July 10, 1961, observed as follows:

> "The upshot of the statutory definitions and the transportation policies, noted earlier, is that contract carriage can exist only in circumstances where adequate common carriage is not found. With no issue of adequacy in the case, the plaintiffs must be accorded the opportunity to furnish the Government service, the contract carrier denied it."

B. Amendment To Section 209(b) Did Not Exclude Adequacy Of Existing Service

Section 209(b) is Clear And Unambiguous

The validity of the adequacy of existing service doctrine as applied in appropriate cases has never, to the knowledge of these appellants, been successfully challenged. It had become an accepted part of our transportation law long before August 22, 1957. Congress must be presumed to have known of this application of the standard of consistency with the public interest and the National Transportation Policy. The question then is whether the amendments to §§ 203(a)(15) or 209(b) taken singly or in combination so changed that law as to exclude application of the adequacy doctrine in contract carrier application cases.

The legislative standard set forth in § 209(b), as amended, is as follows:

> "* * * Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall

> be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. • • • "

It is the belief of these appellants that the statutory provision set forth above is clear and unambiguous and "is the best expositor of itself."[6] Thereby, there can be no need to inquire into the legislative history of the amendment for it is well settled that legislative history may not be used to vary the plain meaning of an act.[7]

The term "public interest" and the National Transportation Policy are both well understood. Therefore, as those terms are used in § 209(b) they are to be applied according to their plain and accepted meaning and resort may not properly be had to legislative history for the purpose of drawing inferences which are at odds with that plain meaning. See, *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939); *Packard Motor C.* v. *National Labor Relations Board*, 339 U.S. 485 (1947); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); and *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953).[8]

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[6] *Pennington* v. *Coxe*, 6 U.S. 33, 2 Cranch 33, 52 (1804).

[7] *United States* v. *Missouri P. R. Co.*, 278 U.S. 269, 278 (1929).

[8] And see *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945) where this Court said:

> "This argument from the legislative history undertakes, in effect, to contradict the terms of § 8(f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which

The basic standard governing contract carrier applications set forth in § 209(b), as before, is whether the proposal will be "consistent with the public interest and the National Transportation Policy." The effect of the decision of the district court is literally to read out of § 209(b) the mandate of the National Transportation Policy even though that Policy is an explicit part of the basic statutory standard. This constitutes a change in the law which only Congress has the power to accomplish.

In a number of cases this Court has insisted that the Commission constantly approach regulation under the Act with scrupulous attention to the dictates of the National Transportation Policy.[9] Yet, the district court held that in specifying five or six criteria to be considered in determining consistency with the public interest and the National Transportation Policy Congress precluded consideration of any other elements regardless of the mandate of the Policy to administer and enforce the Act in light of its objectives. In substance, then, the district court held that the specific criteria set forth in § 209(b) constitute the entire scope of the public interest and the National Transportation Policy insofar as contract carrier applications are concerned. These appellants submit that so sweeping a change through the device of statutory construction may not properly be permitted. It is contrary to reason to assume that Congress would sharply curtail the scope of the National Transportation Policy in proceedings under § 209(b) while leaving it unchanged with

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finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. * * *"

[9] See *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), and *American Trucking Associations* v. *United States*, 364 U.S. 1 (1960).

respect to every other section of the Interstate Commerce Act. Accordingly, the district court erred in holding that the Commission may not consider the adequacy of existing carrier service in determining whether or not a contract carrier application would be "consistent with the public interest and the National Transportation Policy."

Prescribed Criteria Require Consideration Of Existing Service

At this juncture it must be pointed out that the district court in holding that the Commission may no longer consider adequacy of existing service necessarily assumed that in the case at bar the Commission held that merely because common carrier service was available no contract carrier service would be authorized. This is not an accurate appraisal of the Commission's decision. The Commission specifically found that the applicant's proposal constituted contract carriage (79 M.C.C. 706, R. 44-45). Then, in applying the public interest standard of § 209(b), including the specified criteria, the Commission found that the reasonable transportation needs of the shipper could be adequately met by the available service of existing common carriers and did not require the service proposed by the applicant. Thus, it is not the mere availability of common carrier service that warranted denial of the application, but rather it was the fact that the shipper's reasonable transportation requirements could be adequately met by such available service.

When the case is reviewed in proper prospective it becomes clear that adequacy of available service is necessarily included in at least two, and perhaps three of the criteria specified in § 209(b). Stated in simplified form the criteria are:

(1) The number of shippers to be served,
(2) The nature of the service proposed,
(3) The effect which granting the permit would have upon the service of protesting carriers,

(4) The effect which denying the permit would have upon (a) the applicant, and or (b) the shipper, and
(5) The changing character of the shipper's requirements.

With respect to the second criterion, "nature of service proposed," it is apparent that in order to consider the nature of the proposed service in relation to the public interest and the National Transportation Policy, consideration must be given to the shipper's transportation requirements and the nature of the available transportation service. To do otherwise would be to attempt to determine the public interest in a vacuum.

The third of the prescribed criteria is that the Commission shall consider the effect that granting a permit would have upon protesting carriers. Plainly, because all of the criteria are set forth simply as considerations to be made by the Commission in determining consistency with the public interest and the National Transportation Policy, the evaluation by the Commission of the effect upon protesting carriers must be in terms of the public interest and the Policy. Therefore, such consideration must of necessity include an evaluation of the shipper's transportation requirements and the adequacy in light of those requirements of the available service of protesting carriers. To fail to so evaluate the effect upon protesting carriers of a grant of a permit would render this criterion substantially meaningless. Indeed, the very inclusion of this criterion in the 1957 amendments to § 209 (b) is indicative of Congressional approval of the long line of Commission decisions holding that existing carriers are entitled to an opportunity to transport all traffic which they can handle adequately and efficiently before new operations will be authorized.

If the Commission, in summary fashion, granted all contract carrier applications without considering whether the service for which authority is sought is actually pro-

vided by or available from existing common carriers, as the district court would apparently have it do, the granting of each such permit would be an effective removal of actual or potential traffic from the common carrier system. Moreover, if existing common carrier service is eliminated from the Commission's considerations, the inevitable result can only be summary approval and issuance of such permits. At each industrial facility, at each commercial house, contract carriers could obtain new authority on the theory that the existence of adequate common carrier service does not negative the creation of a new and competitive contract carrier service. The result could only be an administration of the Interstate Commerce Act precisely contrary to the basic motives and purposes underlying the passage of that Act and clearly stated in the National Transportation Policy. If the Commission is required to permit the persistent whittling away of common carrier traffic, actual or potential, through the granting of contract carrier permits regardless of the availability of common carriers to serve the same shippers, that agency could not possibly discharge its duty to foster sound economic conditions in transportation.

Neither under the Interstate Commerce Act as amended in 1935 (49 Stat. 543) nor under the 1957 amendments to the contract carrier provisions thereof, does there appear language warranting the pyramiding of new authority so as to jeopardize carriers already authorized by the Commission. The very passage of the law requiring government licensing before new for-hire operations in interstate or foreign commerce may be instituted is in itself persuasive that the economic health of presently certificated or permitted motor carriers is important to the nation. That idea finds specific expression in the National Transportation Policy.

Our fluid and dynamic economy constantly changes the location of factories and plants. Construction of a new

plant here often means the closing there of a plant long served. New commodities, new products constantly replace the old and familiar. Potential traffic thus becomes as important as traffic presently enjoyed. Today's potential becomes tomorrow's reality. The considered traffic may be academically "potential" to U.S.A.C., but since its imbalance of traffic causes it to "deadhead" its vehicles empty westbound from the origin terminal, Indianapolis (R. 116), the failure to be accorded an opportunity to transport the considered traffic is altogether present and real.

As the Commission said in *Smith & Solomon Trucking Co., Extension—Camden, N. J.*, 61 M.C.C. 748, 752-753 (1953):

> "A certificate is a legal privilege. Unless we protect it, we destroy its value. We cannot expect motor carriers to carry out their obligations if we create situations which subvert their efforts to render adequate and efficient service." (Aff'd.—*Smith & Solomon Trucking Co.* v. *U.S.*, 120 F. Supp. 277 (1954).)

Never has such a narrow and shortsighted view as that adopted by the court below been countenanced by the Commission or the courts. Indeed, the Act must be construed with due regard to its purpose.[10] Particular portions of an act should not be read *in vacuo*, but should be considered as a part of the whole with due regard to the overall purpose.[11]

Finally, the fourth criteria, i.e., the effect which denying a permit would have upon the shipper, also requires consideration by the Commission of the adequacy of service already available to the shipper. Thus, where the facts

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[10] *Keystone Transp. Co. Cont act Carrier Application*, 19 M.C.C. 475, 492 (1939); *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907).

[11] *Koppers Conn. C. Co.* v. *Jas. W. B. Line*, 89 F. 2d 865 (1937).

reveal the availability to a shipper of an existing motor carrier service which can adequately meet the shipper's reasonable requirements it is fair to conclude that a denial of a permit would not materially affect the shipper. On the other hand, if the facts revealed that an existing service could not meet the shipper's reasonable requirements, the fair conclusion would be that a denial of a permit would materially and adversely affect the shipper. But, if the Commission is forbidden to evaluate the quality of service available to a shipper how can it make any meaningful determination of the effect upon that shipper of the denial of a contract carrier permit?

Pursuant to § 209(b), as amended, and particularly its plain requirement that the grant or denial of a contract carrier permit rest upon the Commission's determination of consistency with the public interest and the National Transportation Policy, it is manifest that where a proposed contract carrier service is of a type or character consistent with common carriage, those carriers currently in a position to serve a shipper should be given an opportunity to do so. Where common carrier service is shown to be available and suited to the reasonable transportation needs of the shipper a prerequisite to approval of a contract carrier application is that the available service was tried and found wanting. Nor may the required actual or potential loss of traffic, as a test of the effect on protesting carriers, be so great in any single case as to cripple the existing service. For to so hold would be to allow such crippling effect, ignoring each individual case on the theory that no one blow is fatal. Yet, in the aggregate the result could only be a weakening of the national transportation system in direct contravention of the Congressional mandate as set forth in the National Transportation Policy.

National Transportation Policy Includes Adequacy

Moreover, in addition to the foregoing, the factor of adequacy of existing carrier service is also clearly found in the National Transportation Policy itself. This Congressional declaration demands that the Commission "* * * promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *." Even prior to the adoption of the policy in its present form [12] the Commission equated the proposition stated above with adequacy of service. In *Podolsky Contract Carrier Application*, 2 M.C.C. 653, 654 (1937), it was stated:

> "* * * In the consideration of contract-carrier applications we have frequently said that, *in order to foster sound economic conditions* [13] in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territories served by them." (Emphasis added)

Clearly, where it is established that existing carriers are in a position to provide a required service the quoted objectives of the Policy demand that they be afforded an opportunity to do so before a new service is created.

C. Legislative History Demonstrates That No Change In Statutory Standard was Intended or Accomplished

While these appellants assert that disposition of this case can and should be made without reference to legis-

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[12] Prior to adoption of the National Transportation Policy in 1940 very similar language appeared in § 202(a) of the Act, 49 U.S.C. § 302(a), 49 Stat. 543.

[13] This language carries over to this day in the National Transportation Policy enacted *after* this and similar decisions, demonstrating the manner in which the adequacy doctrine is tied so closely to that Policy.

lative history they likewise assert that an examination of that history will demonstrate that no change in the standard was intended or accomplished. This means that adequacy of existing service as a factor, embraced within the public interest and the National Transportation Policy, was not intended to be excluded by Congress in the 1957 amendments. The court below takes a contrary view. (R. 167, 173)

Impetus for the 1957 amendments was found in the decision of this Court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956) and initiative for amending the statute was assumed by the Commission itself. In both its 69th and 70th Annual Reports, (1955 and 1956) the Commission recommended amendments dealing with contract carriage. Insofar as is here pertinent, the Commission's original recommended amendments to Sections 203(a)(15) and 209(b) were as follows:[14]

> "(1) By changing paragraph (15) of section 203(a) thereof (49 U.S.C. sec. 303(a)(15)), to read as follows:
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> '(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.';
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> • • • •
>
> "SEC. 2. Part II of such Act is further amended by inserting between the words 'thereunder,' and 'that' in the second sentence of section 209(b) (49 U.S.C. 309(b)), the following: 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' • • • "

[14] S. 1384, 85th Cong. 1st Sess.

The purpose of the Commission in recommending such changes is found in the testimony of former Chairman Clark at hearings held on the bill introduced at the instance of the Commission. There, Mr. Clark said:[15]

> "Under existing law, even though the initial grant of authority may have been based on a showing of need for individual specialized service, there is no assurance once a permit has been granted against a contract carrier actively competing with and supplanting common carriers by subsequently adding a large number of contracts with other shippers. In this connection the Supreme Court recently stated in *U. S. v. Contract Steel Carriers*, decided just a year ago, that a contract carrier is free to aggressively search for new business within the limits of its license. This decision has also cast considerable doubt on the correctness of the Commission's interpretation of the act as to specialization. Freedom to solicit customers without restriction as to specialized service would tend to obliterate the distinction which Congress intended to make between common and contract carriers. The amendments proposed in the bill would enable the Commission to give greater effect to Congressional purpose, first by amending the definition of contract carrier by motor vehicle to state clearly that the transportation services furnished by such carriers are to be of a special and individual nature for one or a limited number of persons and which are not provided by common carriers.
>
> "Two, by specifically providing in section 209 (b) that the Commission, in granting contract carrier authority, may include terms, conditions, and limitations respecting the person or persons or the number or class for which a common carrier may perform transportation services, as may be necessary to assure that the business conducted by the permit holder is that of a contract carrier and within the scope of its permit.

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[15] **Hearings, Before A Subcommittee Of The Committee On Interstate And Foreign Commerce, U.S. Senate, 85th Cong., 1st Ses., On S. 1384 And Other Bills, pp. 23-24.**

> "Third, by removing from the proviso in section 209(b) the prohibition which prevents the Commission from limiting the number of effective contracts which a contract carrier may have under its permit. The recommended amendment to section 212 is in the nature of a grandfather clause authorizing the Commission to issue a certificate in lieu of a permit without proof of convenience and necessity, where it finds that the operations of existing permit holders do not conform to the revised definition, are those of a common carrier and are otherwise lawful."

It is obvious from the recommended language of the Commission and from the testimony of its spokesman that it sought no change in the basic legislative standard to the effect that prior to issuance of a permit the proposed operation must be shown to be "consistent with the public interest and the National Transportation Policy."

The measure encountered vigorous opposition, particularly by the Contract Carrier Conference, an appellee here. It should be observed, however, that opposition of that Conference was not directed to the Commission's stated purpose, but against the inclusion of language recommended by the Commission and which the Conference, later joined by the Commission, deemed unnecessary to the accomplishment of the Commission's stated purpose. Further reference to the legislative history will establish the accuracy of this analysis.

In the hearings before the Senate Subcommittee on Surface Transportation on S. 1384, the Contract Carrier Conference was represented by its General Counsel, who also represents that Conference in the instant proceeding. Certain of the statements of the witness are particularly illuminating at this juncture.

At pages 299-300 of Hearings, Before A Subcommittee of The Committee on Interstate and Foreign Commerce, U. S. Senate, on S. 1384, the Contract Carrier Conference General Counsel said:

"• • • Now, in addition, Mr. Chairman, to the suggestion that we thought would be helpful to the Commission [dealing with limitations in contract carrier permits and grandfather provisions], we had a suggestion that we thought would be helpful to the contract carriers. As I have stated before, the contract carrier must obtain a permit from the Interstate Commerce Commission. The suggestion that we have made, both before this committee and before the Commission, would limit contract carriers rather than provide for any expansion, so that we felt that section 209(b), the section of the law under which the Commission may grant a new contract-carrier permit, or the extension of a permit, if it is shown that the service proposed is consistent with the public interest and the national transportation policy.

"*We do not suggest any change in that standard.* The only thing we have suggested in that connection is that there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, and we have tried to spell those out, and I have put into my statement the exact language which we have suggested, that the primary thing that we have always felt the Commission should do in those cases is *consider not only the effect of granting this authority on the common carrier—they do that in each and every case*—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration • • •." (Emphasis added)

At page 303 of Hearings, supra, the General Counsel said:

"S. 1384 would amend section 209(b) in such a way as to make it necessary for any contract carrier seeking new or extended authority to prove that the service proposed was one that common carriers were unwilling or unable to perform. Such requirement would, for all practical purposes, put to an end any extension of contract carrier services, for in practically every instance where a contract carrier seeks either new or extended rights, opposing common car-

riers oppose the application alleging that they are willing and able to perform the proposed service. Since the state of mind of the common carriers concerning their willingness is a matter peculiarly within their own knowledge, it would be absolutely impossible for a contract carrier to ever prove to the contrary. Furthermore, it would be very difficult for a contract carrier or its supporting shipper, having no intimate knowledge of the business of opposing common carriers, to prove that such carriers were unable to perform a given service."

The foregoing makes clear that the Contract Carrier Conference sought no change in the standard applicable to contract carrier applications. The witness for the Conference called attention to the fact that under the then-existing standard, the Commission had always considered the available common carrier service and urged only that *in addition* to such consideration the Commission should also be required to consider the effect of denial upon the applicant.

The Conference in that testimony objected to the more restrictive language proposed for inclusion in the definition of contract carriage and to the strict limitation that a permit should be issued only if existing common carriers were shown to be unable or unwilling to provide the service regardless of the public interest. The Commission concurred as will now be shown.

With respect to the described objectionable language proposed for amending § 209(b), former Chairman Clarke testified at pages 21-22 of Hearings, supra, as follows:

"• • • As drafted, S. 1384 would further provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point, that because of the very difficult burden of proof that would be imposed on applicants by the last-mentioned provision, the Com-

> mission, upon further consideration, has voted to withdraw its recommendation to amend Section 209(b) in this respect. * * * "

And with respect to the similar language contained in the recommended amendment to § 203(a)(15), Chairman Clarke wrote the Subcommittee under date of May 21, 1957, as follows: [16]

> "You will recall that the Commission recommended during the hearing that S. 1384 be amended by removing the requirement of a showing that existing common carriers are unwilling or unable to render the required type of service. Upon further consideration, the Commission has unanimously voted also to recommend that the words 'and not provided by common carriers' be deleted from line 6 of page 2 of the bill. These words are not necessary to carry out the purpose of the bill, and the deletion thereof is consistent with our previously expressed position, and with the standard already provided in the bill respecting special and individualized services."

The position of the Interstate Commerce Commission in the court below and before this Court is consistent with that taken by it before the Senate Committee. On the other hand, the Contract Carrier Conference in the court below, and in its motion to affirm herein, takes the position that by deleting the language referred to, the Congress substantially changed and limited the nature of Commission consideration of a contract carrier application.

Appellants urge that deletion of the language found objectionable by the contract carriers had only the effect of maintaining in *status quo* the burden of contract carrier applicants and left the broad scope of the Commission's consideration in such cases precisely the same as it was previously. We respectfully urge that for the Contract Carrier Conference now to take a position that the considerations to be weighed by the Commission in

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[16] Hearings, pp. 43-44, supra.

determining consistency "with the public interest and the National Transportation Policy" are limited or restricted is a reversal of the position taken before the Senate Committee and is not warranted by the legislative history.

If more is needed to establish Congressional intent a reference to the Senate Committee report [17] accompanying S. 1384 is illuminating. Concluding the main body of its report the Committee said:

> "Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed."

The background of the 1957 amendments considered, we respectfully submit that (a) there was no change in the basic standard governing contract carrier applications, (b) there was no intention whatever to curtail the discretion of the Commission in applying that standard, and (c) at most the intention was to insure consideration in all cases of the matters specified in the amendments.

D. The District Court Substituted Its Judgment For That Of The Commission

The court below, in reversing the Commission, concluded that the Commission had placed upon applicant the burden of proving the service of existing carriers inadequate in violation of § 209(b), as amended. The court said (R. 170):

> "• • • The Commission goes beyond the language and scope of the statute when it assumes and requires:
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> "(a) That applicant carries the burden of showing that existing services are inadequate; • • •"

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[17] S. Rep. No. 703., 85th Cong., 1st Ses., p. 7.

The statement of the Commission in its decision with respect to the question of burden of proof is illuminating and reads: (R. 47)

> "Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary the very business of U.S.A.C. is the transportation of the type of traffic involved."

Thus, it is seen that the Commission has expected existing carriers to come forward—as did U.S.A.C. here—and demonstrate their ability to provide an adequate service for the subject transportation. The district court erred in viewing as a question of burden of proof what is at most a matter of going forward with the evidence which necessarily shifts in the course of a hearing.

Under § 209(b), as amended, one of the criteria which the Commission is required to consider in determining consistency with the public interest and the National Transportation Policy is "the effect which granting the permit would have upon the services of the protesting carriers." It must be observed that the statute does not speak in terms simply of existing carriers, but rather speaks in terms of "protesting" carriers. Thus, an existing carrier clearly has the burden of proving the quality of its own service. If it does so, the burden of going forward with the evidence, i.e., the burden of rebutting evidence adduced by a protesting carrier, shifts to the applicant. In the case at bar U.S.A.C. did actively intro-

duce evidence and carry its burden of proof in demonstrating the nature of its existing service. The applicant failed to rebut or overcome that evidence and on that basis the Commission found that existing service was not shown to be inadequate (R. 47). There is no warrant for the assumption made by the court below that the Commission placed upon the contract carrier applicant the *initial* burden of proving existing service inadequate.

Moreover, the court below compounded its error by substituting its judgment for that of the Commission with respect to a material question of fact as to which the Commission's finding is supported by substantial evidence. The court said (R. 177):

> "* * * The Commission has entirely ignored the affirmative evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier * * *"

The rationale of the district court is not entirely clear. However, the court appears to have harbored the erroneous thought that a common carrier cannot provide specialized transportation service needed by a supporting shipper. The Commission on the basis of substantial evidence of record found to the contrary (R. 46-47).[18] In holding

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[18] With respect to the type of service generally provided by U.S.A.C. under its common carrier certificate, and with particular reference to the suitability of that service to the transportation requirements of the supporting shipper the Commission said (R. 46-47):

> "* * * U.S.A.C., by confining its activities almost entirely to serving the aircraft industry, is presently furnishing a highly specialized service to numerous other aircraft manufacturers whose requirements are similar, if not the same, as those of the supporting shippers. In fact, its ability to obtain business depends on its ability to satisfy the needs of shippers having transportation requirements similar to those of these supporting shippers, and it is dependent upon the very

that the service required by the supporting shipper in this case could not be supplied by a common carrier the court below has substituted its judgment for that of the Commission with respect to a material question of fact and has thereby exceeded its role as a reviewing court.

Many common carriers render specialized services. Specialization among common carriers is as old as the industry itself.[19] Such specialization is epitomized by the tank truck carrier, the heavy hauler, and the household goods carrier.[20] Indeed, these carriers were de-

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kind of traffic as is here considered for the continuance of its operations. In view of our determination that a common carrier may furnish a specialized service provided it offers such service to the public generally, there is no question but that U.S.A.C. holds the operating authority necessary to furnish the needed service. Its drivers have security clearance; it has equipment suitable for transporting aircraft assemblies, parts, and equipment; and, if the supporting shippers will furnish it with specifications for the fixtures necessary to handle their particular traffic, it will modify as many pieces of its equipment as is necessary to provide adequate service. Furthermore, it is willing to dedicate certain of its trailers to the exclusive use of each of the shippers. In this connection, it is noted that its tariff contains a provision whereby it may exercise control over the type of equipment to be used in a particular movement. This is a provision frequently found in tariffs published by common carriers; however, in view of this protestant's expressed willingness to modify its equipment to fit the shippers' specifications and to assign such equipment to the exclusive use of each of the shippers, there does not appear to be anything in its tariff which would prevent it from rendering a satisfactory service."

[19] See, *Classification of Motor Carriers of Property*, 2 M.C.C. 703 (1937) and *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952).

[20] For discussions of common carrier specialization see *Classification* and *Description* cases, supra note 19, and see cases such as *American Red Ball Transit Co., Inc.* v. *McLean Trucking*, 67 M.C.C. 305 (1956); *St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling*, 53 M.C.C. 277 (1951); *W. J. Dillner Transport Co.—Investigation of Operations*, 79 M.C.C. 335 (1959); and *The Western Express Company Extension—Sealdtanks*, —— M.C.C. ——, March 22, 1961 (Docket No. MC-8902, Sub 12).

veloped because of a need for specialized common carrier services, services which would meet the "distinct" needs of certain classes of shippers. There are specialized common carriers which are oilfield carriers,[21] auto carriers,[22] transporters of radioactive material,[23] and as here, carriers specializing in the field of transporting airplanes and/or parts and components thereof. The Commission itself in its decision in this case discussed at some length the subject of specialization by common carriers and made it plain that the mere need on the part of a shipper for a specialized service does not preclude the rendition of that service by a common carrier (R. 35-37).

The record contains no facts whatever which dispute U.S.A.C.'s qualifications in the field. The record shows affirmatively that U.S.A.C. is specialized in the field; that it handles traffic of the same type as that here involved; that it supplies specially adapted vehicles for such purposes; and that it is ready, willing and able to make such modifications as may be necessary to adapt trailers to the particular articles shipped by Boeing. The court below appears to have been of the view that a specialized service is, without more, a contract carrier service and that where specialization is present common carriers are either legally or physically disqualified. This assumption has no grounds for support and is demonstrably contrary to both fact and law.

Within the regulatory framework of the Interstate Commerce Act the Commission concluded that the services of U.S.A.C. were available and had not been shown to be inadequate to meet the reasonable transportation needs

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[21] *Mercer Extension—Oilfield Commodities*, 74 M.C.C. 459. (1946)

[22] *Dealers Transit, Inc., Interpretation of Certificate*, 76 M.C.C. 12 (1955).

[23] *Continental Tennessee Lines, Inc.* v. *Ligon*, 78 M.C.C. 319 (1958).

of the supporting shipper. Substantial evidence of record supports these findings and, accordingly, the district court erred in substituting its judgment for that of the Commission.

The district court also appears to have adopted the view (R. 175-176) that the Commission may not deny a contract carrier application simply because the applicant has failed to meet one or more of the specific criteria. Here again, the court substituted its judgment for that of the Commission on a matter committed to agency discretion. While § 209(b), as amended, specifies certain criteria which the Commission must consider in determining consistency with the public interest and the National Transportation Policy, the section does not purport to direct the Commission as to the weight to be given any or all of the specified criteria. Thereby, it is the province of the Commission to exercise its expert judgment in weighing all material factors. Clearly, any *one* defect in an applicant's proposal, if of sufficient magnitude in the judgment of the Commission, may render the proposal inconsistent with the public interest and the National Transportation Policy.

VIII

CONCLUSION

These appellants respectfully pray this Honorable Court to reverse the judgment of the court below and to remand the case with instructions to dismiss the complaint.

Respectfully submitted,

ROLAND RICE
JOHN C. BRADLEY
618 Perpetual Building
1111 E Street, N. W.
Washington 4, D. C.

PAUL F. SULLIVAN
1825 Jefferson Place, N. W.
Washington, D. C.

JAMES E. WILSON
716 Perpetual Building
1111 E Street, N. W.
Washington 4, D. C.

DATED: September 1, 1961

APPENDIX

Text of Statute Involved

Prior to August 22, 1957	Subsequent to August 22, 1957
Former § 203(a)(15)	***Amended § 203(a)(15)***
"The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."	"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."
Former § 209(b)	***Amended § 209(b)***
"Application for permit; form and contents; issuance of permit; terms and condition.—Applications for such permits shall be made to the commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the commission may, by regulations, require. Subject to section 210, a permit shall be issued	"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations

Former § 209(b)

to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules and regulations of the commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this act; otherwise such application shall be denied. The commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the commission under section 204 (a)(2) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities,

Amended § 209(b)

covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, con-

Former § 209(b)

within the scope of the permit, as the development of the business and the demands of the public may require."

Amended § 209(b)

sistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided,* That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso."

National Transportation Policy [*unchanged*],
49 U.S.C. preceding § 1

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."